BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals of the Tenth Circuit in this case has not yet been reported in book form, but it is found in the printed record filed here at pages 309 to 314.

II. JURISDICTION.

A. The jurisdiction of this court is invoked under the judicial code and rule 38 of the rules of this court.

B. The date of the decree sought to be reviewed is May 24th, A. D. 1944 (315). A petition for rehearing was denied on June 19th, A. D. 1944 (319).

III. STATEMENT OF THE CASE.

A statement of the case is set forth in the Petition for Writ of Certiorari, appearing under heading A, filed herewith, and is hereby referred to and adopted.

IV. SPECIFICATION OF ERROR.

The errors assigned under heading "Questions Presented" as sub-heading B of the Petition for Writ of Certiorari, filed herewith, are hereby referred to and adopted as the specification of such of the assigned errors as are intended to be argued.

V. ARGUMENT.

A. Summary of the Argument.

1. Kortz having been judicially determined to be totally and permanently disabled in the case of *Guardian Company v. Kortz*, 109 Colo. 331, 125 Pac. 2nd 640, had the right and it was his duty to plead the proceedings in the court which had first judiciously determined his total and permanent disability Kortz was entitled to have Guardian plead to his complaint which set forth the proceedings in the prior trial, and to require Guardian to either admit or deny the effect of those proceedings, or if Guardian did not admit or deny the effect of those proceedings, to require Guardian to affirmatively plead that the condition of Kortz had so

changed or improved as to make him no longer permanently and totally disabled.

2. Kortz contends that he had the right in the trial of the second case to stand upon the prior adjudication of his total and permanent disability, and that he was under no obligation to and should not have been required by the trial court to again prove his total and permanent disability; that Guardian should have been required to prove by a preponderance of the evidence a change in Kortz's condition so that he was not at the time of the trial of the second case totally and permanently disabled.

3. Kortz contends that he was entitled to rely and stand upon the presumption in law of the continuance of the total and permanent diability which had been judicially determined to exist in the prior case.

4. Kortz contends that the trial court should have directed a verdict in favor of Kortz, there being no evidence of change or improvement introduced by Guardian; on the contrary, the evidence of Guardian was exactly the same evidence, exactly the same witnesses, offered in the trial of the previous cause.

5. Kortz contends that having entered into a contract with Guardian for which additional premiums were paid by him, he was entitled to have that contract as written enforced by the court, and having been judicially determined totally and permanently disabled, and no demand for proof of the continuance of such disability having been made by Guardian until the second suit was instituted for the period between the determination of the first suit and the notice of demand by Guardian, he was entitled as a matter of law to payment of disability benefits.

B. The argument.

1. The prior adjudication of a fact by a court of competent jurisdiction is res adjudicata or estoppel by judgment, and the fact so adjudicated "cannot again be litigated between the same parties and their privies whether the claim, demand, purpose or subject matter of the two suits is the same or not". *Henderson v. United States Radiator Corporation*, 78 F. 2nd, 674, at page 675 (C.C.A. Tenth Circuit).

That Kortz was judicially determined totally and permanently disabled is shown in the case of *Guardian Company v. Kortz,* 109 Colo. 331, 125 Pac. 2nd 640, where the court says at page 336:

> "That disability for which indemnity is payable under the contract is such as permanently, continuously and wholly prevents him from following any occupation whatsoever for remuneration or profit."

In the second case brought by Kortz for disability benefits, it was his right and duty to plead the prior proceedings in full, and it was the right and duty of Guardian to meet that plea either by admitting, denying or affirmatively avoiding the effect of it. This is the law under many decisions in the State of Colorado. In the case of *Pomponio v. Larsen,* 80 Colo. 318, the court at page 321 says:

> "It is fundamental, and well understood, that the judgment of any court of competent jurisdiction, so long as it remains unreversed, is conclusive upon the parties and their privies when the judgment is rendered upon the merits, and without fraud or collusion, upon a matter within the jurisdiction of the court rendering the judgment. Such a judgment is an absolute bar to the prosecution of a second action on the same claim or demand, not only as to matters actually in controversy in the first action, but as to every matter which might have been litigated and determined therein incident to and necessarily connected with the subject matter of the litigation."

And again at page 323 the court says:

> "Where the defendant pleads a former judgment in bar the plaintiff must admit or deny the judgment or deny that it was for the same cause of action."

Clearly the action of the trial court in sustaining the motions of Guardian to strike all reference to the prior case from the complaint, from the amended complaint and also from the second amended complaint is contrary to the above authority, and deprives Kortz of the right to have Guardian admit, deny or avoid by pleading a change of condition the effect of the prior adjudication.

2. That Kortz had the right as a matter of law to stand upon the prior adjudication of his total and permanent disability is definitely supported by the case of *Counter v. U. S.*, 127 F. 2nd 761 (C.C.A. Seventh Circuit).

3. As a matter of law, there was a presumption that a disability once having been judicially determined to be total and permanent would continue until a change of condition, an improvement or a recovery was proved by Guardian by a preponderance of the evidence.

Anderson v. U. S., 126 F. 2nd 169 (C.C.A. Third Circuit), *Edmonds v. U. S.*, 24 Fed. Supp. 742, *Countee v. U. S.*, 127 F. 2nd 761 (C.C.A. Seventh Circuit), *Kontovich v. U. S.*, 99 F. 2nd 661 (C.C.A. Sixth Circuit): All of these cases and many in the federal courts recognize the presumption of the continuance of total and permanent disability raised by a judicial determination by a court of competent jurisdiction, and recognizes and places the burden of proof on the insurance company that a change, an improvement or a recovery has occurred. There are many cases in the state courts supporting exactly the same proposition. *Equitable Life Assurance Society v. Bagley*, 94 S.W. 2nd 722 (Ark.); *Metropolitan Life Insurance Company v. Pribble*, 130 S.W. 2nd 332; there is an annotation on this subject which quite thoroughly exhausts the cases and is found at 142 A.L.R. 170.

One of the most flagrant cases to demonstrate the reason for this rule is the case of *Boillot v. Income Guaranty Company*, 124 S.W. 2nd 613, a Missouri case. In this case the insurance company refused to make payments to a piano tuner who had a policy of insurance providing for indemnity in case of total and permanent disability. A suit was brought, and a jury found the insured to be totally and permanently disabled. The case was taken to the appellate court of the State of Missouri and affirmed. The judgment so entered was paid. Thereafter the company refused to make further payments. The assured brought suit, pleading the prior adjudication. The company admitted the prior adjudication, but attempted to again raise the question of the total and permanent disability without showing any change of fact. The trial court held that the prior adjudication was res adjudicata or estoppel by judgment, and there being no

change of condition pleaded or proved, as a matter of law the assured was entitled to judgment.

The reported case reviews the steps which the assured was required to take. There were five distinct cases brought prior to the one reported, and the court after the second case under a Missouri statute assessed special damages against the insurance company for its arbitrary refusal to pay the claim, and reviews the burden that would be placed upon an assured if it were not for the presumption of the continuance of the existence of the total and permanent disability of having to prove its existence every time the company refused to make payments. A company could so harrass the assured and could by arbitrary refusal so burden the assured that the benefits of the insurance for which premiums were paid could be completely destroyed.

A further basis for this very sound rule is the need to develop and insure recognition of and respect for judicial conclusions in courts of competent jurisdiction. This basis, this need and this thought is very clearly expressed by a decision of this court, an early decision, which has been recognized many times since and quoted; the case of *Southern Pacific Railroad v. U. S.*, 42 L. Ed. 355, 168 U. S. 1, where the court at page 48 says:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established,* so far as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as be-

tween parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (Italics ours.)

4. This court has the right to examine the evidence offered by Guardian in the trial of this cause to determine whether or not there was sufficient to show a change of condition, an improvement or a recovery on the part of Kortz. This court in the case of *Universal Oil Products Company v. Globe Oil and Refining Company,* being case No. 392 and decided in May, 1944, and not reported, re-examine the factual questions involved.

A re-examination of the factual questions involved in this case, and particularly the witnesses of Guardian, will show that Dr. Robert G. Packard testified that he had examined Kortz both before and after March 21st, 1939 (this date being the date of recovery in the first case); that there was no change shown by the X-rays taken in 1943 prior to the trial of this case from those taken previously (188); that from a study of the X-ray pictures, he found that over a period from 1937 to May 4th, 1943, the condition as to the arthritis is virtually unchanged (198).

Dr. Ward Darley, a witness for Guardian, testified that he had first examined Kortz on March 21st, 1939, which was prior to the trial of the first case, at which he testified, and again examined Kortz on July 14th, 1943 (215); that he could not demonstrate evidence of heart disease at either examination; that the cardiogram taken July 9th, 1943, showed the inversion of the T wave in Lead 3 and the left axis deviation is the same as the cardiogram taken in 1939 (225).

These were the only medical witnesses offered by Guardian, and nowhere in their testimony is there any statement of change, improvement or recovery.

Guardian offered motion pictures of Kortz, showing him walking, getting out of an automobile, etc. Of course, the motion pictures cannot be attached to the record, but it is singular that neither the motion pictures nor any testimony was offered to show that Kortz was engaging in his usual vocation or had engaged in his usual vocation or was not disabled from so engaging.

It is respectfully urged that this court review the evidence offered by Guardian, and it is respectfully contended that a review of that evidence will lead to the conclusion which is inescapable, that Guardian failed wholly to overcome the presumption of the continuance of the disability or to prove by a preponderance of the evidence or at all a change of condition, an improvement or a recovery. With the evidence offered, the trial court should have directed a verdict for Kortz, and failing in this, after the jury returned its verdict, should upon the motion of Kortz to enter judgment in his favor notwithstanding the verdict, have entered a judgment for Kortz.

5. The final proposition urged is that the trial court made a new contract for the parties. There was nothing illegal about the provision of the contract to the effect that a total and permanent disability having once been established and having continued for two years could not be questioned by Guardian nor demand made for proof of such continuance at intervals of less than one year. This was the contract which Guardian sold Kortz. This was the contract which Guardian prepared and for which clause and provision Kortz paid an additional premium. Kortz was entitled to the repose and freedom from harrassment which this provision gave him, having been judiciously determined totally and permanently disabled for more than two years prior to the institution of the second suit, when the demand for proof of continuation of disability was made. There was no public policy involved. The provision was reasonable.

The reference of the Supreme Court in the first trial would appear to be very appropriate in the discussion of this point, where the court at page 336 says:

> "We think this is a reasonable and logical resolution of the conflict that ordinarily exists between the agent's selling construction and the claim agent's settling construction of such clauses."

Undoubtedly when this contract was sold to Kortz, the agent's selling talk was that if he were so totally and permanently disabled within the terms of the policy, the company could not and would not worry, annoy and harrass him with constant examinations and constant demands for proof

of continuance of disability, and that payments would continue until demand for proof was made, and that demand for proof under the policy after payments had continued for two years could not be made more often than once a year.

VI. CONCLUSION.

In conclusion, your petitioner respectfully urges this court to consider what was done by the Circuit Court of Appeals and by the United States District Court which tried this cause, not what the respective opinions of these courts say was done.

What did the action of the trial judge and the approval of that action by the Circuit Court do to your petitioner's rights?

He was denied the right to plead the prior adjudication. He was denied the right to require Guardian to answer that plea. He was denied the right to rely upon a presumption in law of the continuance of a disability once judicially determined to be total and permanent. He was required to assume the burden of proving the continuance of this disability, while Guardian was relieved of the duty of proving by a preponderance of the evidence a change of condition.

The trial court expressly placed the burden upon Kortz to prove by a preponderance of the evidence his disability, and then in a feeble way made some involved reference to a presumption (267), and the trial court in closing its instructions stated:

> "The burden of proof is upon the plaintiff to establish his cause to your satisfaction by a preponderance of the evidence. That means that if the evidence is equally balanced when you weigh it or is in favor of the defendant, then the plaintiff has not sustained that burden, and cannot recover. On any contested point his evidence must to some slight degree at least outweigh the evidence of the defendant before you can find a verdict for the plaintiff. That is what is meant by the preponderance of the evidence or the burden of proof" (273).

Nowhere does the court say that there is any burden upon Guardian. The effect of the decision is in direct conflict with the decisions of the Circuit Courts of three other circuits, and this court should for all time settle this conflict so that litigants can with some degree of security know which of the decisions of the various circuits shall control.

Kortz did not receive that kind of fair trial based upon the laws which he had a right to expect.

The Writ of Certiorari should, we respectfully submit, be granted.

Respectfully submitted,

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